United States Court of Appeals

for the Second Circuit

RESPONDENT'S BRIEF

No. 75-4165, et al.

United States Court of Appeals

FOR THE SECOND CIRCUIT

MAURICE GERSHMAN d/b/a
QUEENS-NASSAU NURSING HOME,

Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,

Respondent.

NATIONAL LABOR RELATIONS BOARD,

Petitioner,

v.

CYCLE CLEANING CORPORATION,

Respondent.

ON PETITION FOR REVIEW AND CROSS-APPLICATION
FOR ENFORCEMENT OF AN ORDER OF THE
NATIONAL LABOR RELATIONS BOARD

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

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AUTHORITIES CITED

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Nos. 75-4165, 75-4187, 75-4188

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BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

COUNTERSTATEMENT OF THE ISSUE PRESENTED

Whether the Board properly determined that Maurice Gershman d/b/a Queens-Nassau Nursing Home and Cycle Cleaning Corporation are joint employers and jointly and severally liable for the unfair labor practices committed herein.

COUNTERSTATEMENT OF THE CASE

No. 75-4165 is before the Court upon petition of Maurice Gershman d/b/a Queens-Nassau Nursing Home (hereafter referred to as "the Home") to review a Decision and Order issued against it and Cycle Cleaning Corporation (hereafter referred to as "Cycle") on June 30, 1975, and reported at 218 NLRB No. 183 (A. 2).[1] The Board has cross-applied for enforcement of its order (No. 75-4187). This Court has jurisdiction of these proceedings under Section 10(e) and (f) of the Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C. 151, *et seq.*). No. 75-4188 is before the Court upon the application of the Board for summary enforcement of the same order against Cycle Cleaning Corporation.

I. THE BOARD'S FINDINGS OF FACT

The Home is engaged in operating a nursing home and performing related services in Queens, New York, where the unfair labor practices occurred. Cycle Cleaning Corporation is also located in Queens, New York, where it provides housekeeping, porter, and related services for various nursing homes in the City of New York (A. 10).

A. The Board holds a consent election among the porters and maids employed at the Home

Prior to October 30, 1973, the Home's housekeeping department performed its own cleaning and maintenance duties largely with its own

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[1] "A." references are to the portions of the record reproduced as an appendix to petitioner's brief. References preceding a semicolon are to the Board's findings; those following are to the supporting evidence.

employees. On October 30, 1973, the Home entered into a contract with Cycle which provided that, for a fixed fee, Cycle would perform "all such duties as would be performed by Home's housekeeping department" and that Cycle would provide porters and maids to perform these duties (A. 11; 47, 44).

On May 16, 1974,[2] Local 144[3] filed a representation petition seeking certification as exclusive bargaining agent of a unit consisting of non-professional employees, including nurses aides, employed by the Home, and housekeeping employees, including porters, employed by Cycle. On May 21 a consent agreement was signed by Cycle and the Home stipulating as an appropriate unit "all porters and maids employed jointly" by Cycle and Home and providing for an election to be held on June 12 with Local 144 and an intervening union, Local 1115[4] on the ballot (A.11). Although not on the ballot, two other unions also attempted to solicit employee support during the ensuing campaign (A. 11).

On June 12 the election took place in which 33 votes were cast for Local 144, 8 for Local 1115, and 23 against the labor organizations, with 11 ballots challenged. On June 17 Local 1115 filed objections to the election, and on July 8 it filed unfair labor practice charges, resulting in the issuance of a complaint. On October 31 the Regional Director issued a report on the objections, recommending a hearing on the objections consolidated with the unfair labor practice case (A. 11-12).

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[2] All dates hereafter are in 1974, unless otherwise specified.

[3] Local 144, Hotel, Hospital, Nursing Home and Allied Health Services Union affiliated with Service Employees International Union, AFL-CIO.

[4] Local 1115, Joint Board, Nursing Home and Hospital Employees Division.

B. The relationship between the Home and Cycle

The contract between the Home and Cycle provides for Cycle to perform all the housekeeping duties and specifies that "the housekeeping department will operate as part of the nursing home staff" (A. 13; 47). The contract specifies in detail the cleaning services required and how they are to be accomplished. The agreement specifically reserves to the Home the furnishing of all materials and supplies necessary for the cleaning services (A. 13; 28-32, 36-40, 43). As to the hiring of all personnel and supervision for the housekeeping department, the contract provides that "all changes will be made only after discussion and mutual agreement with the nursing home administration" (A. 13; 44). The contract also sets forth in detail the wage rates and fringe benefit costs to the employees in question (A. 13; 46).

Officials of the Home participate in the hiring and firing of Cycle's housekeepers. All housekeeper prospects are interviewed by the Home's Administrator Al Krakowski and Assistant Administrator Morris Lebowitz prior to hiring, and their salaries are subject to the Home's approval. For example, housekeeper Ephraim Klein was hired by Lebowitz, and it was only after he was hired that Klein's duties and responsibilities were explained to him by Cycle's Area Supervisor Esther Watkins (A. 14; 209, 266). Klein was discharged only after consultation with the Home, and Mintz, another housekeeper, was discharged after complaint by the Home. Another housekeeper, Workman, was transferred after complaints by the Home (A. 14; 232, 242-244).

Cycle's porters frequently interchange their own duties with those assigned to the Home's own staff.[5] In performing their jobs, the porters are subject to the joint control and supervision of Cycle and the Home. When Cycle took over the housekeeping, porter Robert Ortiz was told by Lebowitz that henceforth he would be paid by Cycle and that if the porters had any problems in the future they should come to him or to Cycle supervisor Watkins (A. 13; 278-279). When Ortiz was Cycle's head porter, he had to get permission either from Lebowitz or Watkins before he could call in a replacement for an absent porter or before he could take time off himself (A. 13; 299). Non-emergency overtime for porters and maids also was subject to the prior approval of the Home management. Once, the refusal of one of the porters to accept an order from Lebowitz resulted in a meeting of the porters called by Watkins at which she told them unequivocally that all porters were to accept orders from Lebowitz. Thereafter Lebowitz's orders were obeyed (A. 13; 110-111).

C. The assistance given to Local 144 during the campaign by the Home and Cycle

During the campaign, Local 144 representatives were often at the Home, either soliciting employee support in various parts of the Home or fraternizing with supervisory personnel in view of the employees. Local 144

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[5] Evidently, if one of Home's own employees has not shown up for work or a certain task must be performed, Cycle's employees are called upon to do the job (A. 12; 230). Regularly, Cycle's porters have been ordered by Administrator Lebowitz and by Supervisor Watkins to do such jobs as unloading trucks, going to the laundry, storing supplies, painting, putting in light bulbs, plumbing, assisting in the kitchen, moving beds with aides, carrying luggage for patients, fixing appliances, moving sprinklers and assisting maintenance employees with their many duties – none of all the foregoing being part of their regular duties as porters (A. 13 n. 4; 152-155).

Representative Virginia Allen was seen by employees in the Home about six times during May and June (A. 14; 137, 87-88). In May Allen was seen having coffee with Supervisors Mary McNab and Ardis Watson (A. 14; 50-51). Local 144 Representative Goodman was seen at the Home a number of times: making a phone call from a pay phone in the hall (A. 14; 50); talking to a nurse at her station (A. 15; 55-56); talking to employees about the Union in the first floor dining room or in the nurse's station (A. 15; 98-99, 101-102) and handing out Union leaflets to employees on the third floor (A. 15; 67). At various times Administrator Krakowski and Supervisors Watson and McNab were told of the presence of Local 144 representatives soliciting employee support for their Union or were themselves actually present during these solicitations, but they voiced no objections (A. 15; 53, 101-102, 145).[6] Early in 1974, during a discussion about when they would get a union, Cycle Supervisor Watkins told employee Wilkinson that the employees "automatically . . . belonged to 144." (A. 16 n. 7; 131).

Early in June a poster hung in the Home's dining room for a week and a half announcing a meeting to be held by Local 144 in a bar across the street at 3 p.m., an hour before the end of the day shift (A. 15; 95-96). Employee Wilkinson got permission to attend from Cycle Supervisor Watkins, who said it was "okay" as long as he punched out (A. 16; 96).

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[6] Employee Daisy McQueen had done some soliciting for support for a third union, Local 1119, which was known to management but not prohibited or interfered with (A. 15; 69, 72, 75-76). Local 4, Teamster representatives were also seen by McQueen several times handing out literature in the Nursing Home (A. 15; 77-78). However in December, 1973, a business agent for Teamsters Local 4 was ordered to leave the premises by two registered nurses while attempting to talk to employees in the dining room (A. 15; 119).

Local 144 Representatives Allen and Goodman were present at the meeting, as were some nurses aides, porters, and Cycle Supervisor Watkins (A. 16; 97). When a porter said that he heard that "Cycle was automatically 144," Allen responded that Watkins would explain "because Cycle was entirely different than the Home." (A. 16; 120). Then Allen introduced Watkins and said that "as far as the porters were concerned Miss Watkins would tell [them] that." (A. 16; 97).

D. The discriminatory discharge of Robert Ortiz

Robert Ortiz was hired as a porter in July 1973 by Lebowitz, who was then housekeeper at the Home (A. 16; 275). In October Ortiz talked to Local 1115 representative Morales and received Local 1115 authorization cards which he then passed out to employees during breaks, lunch, and after work (A. 16; 279). During that time Ortiz talked to Morales four or five times outside the Home or on the telephone from his home (A. 16; 279). On one of these occasions, as he was coming into the Home with authorization cards in his hands, Lebowitz stopped him and asked him what he had in his hand. Ortiz said, "These are union cards." When Lebowitz asked to look at one, Ortiz handed him a card; Lebowitz looked at it and handed it back without comment (A. 16; 279-280).

On November 25, 1973, after Cycle took over the housekeeping, Ortiz was made head porter and given a $10 raise (A. 17 n. 9; 276). In the beginning of his employment period, Ortiz performed well but as time went on, his absenteeism and lateness — an admitted overall problem with the porters — became a serious problem (A. 18; 349). In early January Watkins called porters together to impress upon them the importance

of prompt and uninterrupted attendance (A. 18; 353-354). About the same time Watkins received a list of three employees — of whom Ortiz was one — who assertedly were on drugs and was ordered to discharge them. When confronted with the matter, Ortiz first denied it, but then revealed that he was in a methadone therapy program. Watkins agreed to keep him on if he would get a letter for his file to that effect, which he did (A. 18; 358-359). Later that month Watkins confronted porters Ortiz, Perez, and Wilkinson about their attendance records. According to Watkins, Perez and Wilkenson improved, but Ortiz did not (A. 18; 362). During the second week of March, Watkins again spoke to Ortiz, warning him of possible discharge (A. 18; 363). Ortiz received two further verbal warnings, from Cycle President Lawrence Roth and Home Administrato Lebowitz (A. 18; n. 13, n. 14, 363-364, 374, 382, 388-390).

Ortiz a[illegible] a tendency to go over the head of the housekeeper and look to L[illegible]witz for his supervision (A. 19; 386). Additionally, Watkins found that on June 4, Ortiz's card was punched in at 8:03 a.m. but he did not arrive at work until 8:30 a.m. (A. 19; 370). At the hearing, Watkins acknowledged that a general problem existed with porters' punching each other's timecards. The problem was serious enough to have warranted a meeting in May with all the porters, at which Watkins warned that she would "change the whole darn crew around" if the practice didn't stop immediately (A. 17 n. 10; 365).

On June 9, Watkins discharged Ortiz (A. 19, 373). When Ortiz asked why he was being discharged, Watkins said that it was because he was "a troublemaker because of 1115." (A. 17; 288).

At the hearing, when asked on direct examination whether Ortiz's discharge had anything to do with the union election, Watkins said, "well, yes and no." (A. 19; 373). She admitted in further testimony that the fear of union organization was the "underlying triggering motivation" for Ortiz's discharge:

> Queens-Nassau wasn't the only nursing home that Cycle had or that I was in charge of. Some of the nursing homes that we had, that we was in charge of, had union. I know for a fact that what you put up with, you know, an employee, this is almost like what you are stuck with. I know that, say, number one, the type of record that Robert Ortiz had, number one, you know, we couldn't put up with that, we definitely couldn't put up with that because it was causing problems with the other people you know. (A. 19; 374).

II. THE BOARD'S CONCLUSIONS AND ORDER

Based on the foregoing, the Board found that Cycle and the Home are joint employers within the meaning of Section 2(2) and (6) of the Act (A. 19, 2-3). The Board also found that employee Robert Ortiz was discharged because of union considerations and accordingly, both Cycle and the Home thereby violated Section 8(a)(3) of the Act (A. 19, 3). Finally the Board found that by contributing assistance and support to Local 144, both Cycle and the Home violated Section 8(a)(2) of the Act.

The Board's order requires Cycle and the Home to cease and desist from the unfair labor practices found and from "in any other manner" interfering with, restraining or coercing their employees in the exercise of their Section 7 rights. Affirmatively, Cycle and the Home are required

to post the usual notices, to offer full and immediate reinstatement to employee Robert Ortiz and to make him whole for any loss of pay he may have suffered (A. 21, 4).

ARGUMENT

THE BOARD PROPERLY DETERMINED THAT MAURICE GERSHMAN d/b/a QUEENS NASSAU NURSING HOME AND CYCLE CLEANING CORPORATION ARE JOINT EMPLOYERS AND JOINTLY AND SEVERALLY LIABLE FOR THE UNFAIR LABOR PRACTICES COMMITTED HEREIN.

The Board found that the Home was the joint employer of Cycle's porters and maids and held both the Home and Cycle responsible for the discriminatory discharge of porter Robert Ortiz as well as for the unlawful assistance and support to Local 144 (A. 12-13).

Cycle did not except to any of the Administrative Law Judge's findings. It is therefore barred from raising those issues before this Court. See Section 10(e) of the Act and *N.L.R.B. v. Ochoa Fertilizer Corp.*, 368 U.S. 318, 322-323 (1961); *Marshall Field & Co. v. N.L.R.B.*, 318 U.S. 253, 255-256 (1943). Since the Home excepted only to the Administrative Law Judge's finding of a joint-employer relationship and does not directly challenge the Board's findings of violations of Section 8(a)(2) and (3) of the Act, in this Court the Board's order is entitled to affirmance in these respects. See, *The Riverside Press, Inc. v. N.L.R.B.*, 415 F.2d 281, 284-285 (C.A. 5, 1969), cert. denied, 397 U.S. 912; *N.L.R.B. v. Tennessee Packers, Inc.*, 344 F.2d 948, 949 (C.A. 6, 1965).

The sole question presented here, therefore, is whether the Board properly determined that the Home possessed sufficient control over the

work of the employees to qualify as a joint employer with Cycle. See *N.L.R.B. v. The Greyhound Corp.*, 368 F.2d 778, 780 (C.A. 5, 1966), citing *Boire v. The Greyhound Corp.*, 376 F.2d 473, 481 (1964). Accord: *N.L.R.B. v. Jewell Smokeless Coal Corp.*, 435 F.2d 1270, 1271 (C.A. 4, 1970). Such a determination of whether the "sufficient indicia of control" exists is essentially a factual issue" (*Boire v. Greyhound Corp., supra,* 376 U.S. at 481) and is entitled to acceptance by this Court where, as here, it is supported by substantial evidence on the record as a whole. *N.L.R.B. v. Checker Cab Co.*, 367 F.2d 692, 698 (C.A. 6, 1966), cert. denied, 385 U.S. 1008; *Ace-Alkire Freight Lines, Inc. v. N.L.R.B.*, 431 F.2d 280, 282 (C.A. 8, 1970). Furthermore, the Board is entitled to consider *de facto* control in ordering remedial action by a party exercising such control in a manner which violates the Act. *N.L.R.B. v. Gibralter Industries, Inc.*, 307 F.2d 428, 431 (C.A. 4, 1962), cert. denied, 372 U.S. 911. Accord: *N.L.R.B. v. The Greyhound Corp., supra,* 368 F.2d at 780.

Analysis of the record shows that the Home effectively controlled Cycle's operations at the Home to the extent that it qualified as a joint employer of Cycle's porters and maids. As shown in the Statement the contract between the Home and Cycle specifies that Cycle's "housekeeping department will operate as part of the nursing home staff," and in fact, Cycle's porters and maids, along with the whole staff, wear identification tags that read "Queens-Nassau Nursing Home." (A. 251). The Home specifically reserved the right to furnish all materials and supplies necessary for the cleaning services. *N.L.R.B. v. Dayton Coal & Iron Corp.*, 208 F.2d 394, 395 (C.A. 6, 1953); *N.L.R.B. v. Greyhound Corp.*,

supra, 368 F.2d at 781. *N.L.R.B. v. Jewell Smokeless Coal Corp., supra.* The hiring procedure is certainly a joint operation: the contract states that "all changes will be made only after discussion and mutual agreement with the nursing home administration." In practice the Home officials exercise considerable authority in connection with both the hiring and the discharge of Cycle's housekeepers. As stated above, all housekeeper prospects are interviewed by Nursing Home Administrator Al Krakowski and Assistant Administrator Morris Lebowitz prior to their hiring and their salaries are subject to the Nursing Home's approval. Housekeeper Ephraim Klein was hired by Lebowitz and only after his hiring were his responsibilities explained to him by Cycle Supervisor Watkins. Klein was similarly discharged only after consultation with the Nursing Home. After complaints from the Home, housekeeper Mintz was discharged and housekeeper Workman was transferred. *Ace-Alkire Freight Lines, Inc., v. N.L.R.B., supra,* 431 F.2d at 282; *Kinney System Inc.*, 48 LRRM 1586 (1961).

Further, the Home exercises considerable control over the porters. Not only are porters regularly assigned tasks usually performed by the Home's own staff, but they are ordered to do these tasks by Home Administrator Lebowitz. After Cycle took over the housekeeping, porter Ortiz was specifically told by Lebowitz that if the porters had any problems in the future they should come to him or Watkins. As Cycle's head porter, Ortiz had to get permission either from Lebowitz or Watkins before calling in a replacement for an absent porter or before taking time off himself. The Home management also had to give prior approval for non-emergency overtime for porters and maids. Lest there be any doubt about the daily supervision and control the Nursing Home management

exercises over the porters – once, the refusal of a porter to accept an order from Lebowitz resulted in a meeting of the porters called by Watkins at which she told them unequivocally that all porters were to accept his orders. Thereafter Lebowitz's orders were obeyed. *N.L.R.B. v. The Greyhound Corp., supra,* 368 F.2d at 781; *Manpower, Inc.,* 164 NLRB 287, 288 (1967); *Bi-State Warehousing, Inc.,* 192 NLRB 608 (1971), enforced 82 LRRM 2688 (C.A. 7, 1972). Thus, by virtue of the Home's control over Cycle's operations and the most elementary employee concerns, the Home "shared or co-determined those matters governing essential terms and conditions of employment" (*N.L.R.B. v. The Greyhound Corp., supra,* 368 F.2d at 780) and the Board properly determined that that the Home was a joint employer of Cycle's employees.

The Home contends (Br. 21-23) that the Board erred in finding it a joint employer of Cycle's porters and maids because Cycle assertedly held the status of an independent contractor. The status of Cycle as an independent contractor, however, is irrelevant to the issue here. Thus, as the Supreme Court observed in rejecting the identical contention, the question whether an employer possessed sufficient control over the work of the employees to qualify as a joint employer with another "is a question which is unaffected by any possible determination as to [the other's] status as an independent contractor," unless "the employees themselves occupy an independent contractor status." *Boire v. Greyhound, supra,* 376 U.S. at 481. Thus, as noted above, *supra* pp. 10-11, the question of whether the Home possessed sufficient "indicia of control to be an 'employer' is essentially a factual issue." *Boire v. Greyhound Corp., supra,* 376 U.S. at 481. The Board considered the various indicia of control, see discussion *supra,* pp. 11-12, and concluded that the "facts

reveal sufficient right of control by Home over the Cycle employees to qualify Home as a joint employer with Cycle." See *N.L.R.B. v. The Greyhound Corp., supra,* 368 F.2d at 781, where on substantially similar facts the Fifth Circuit affirmed the Board's finding of a joint employer relationship.

In fact, originally, in the Agreement for Consent Election signed by both Cycle and Home (Case 29-RC-2659), Home agreed to a unit that included "porters and maids employed jointly by Cycle Cleaning Corporation and Queens-Nassau Nursing Home." Only after the issuance of the unfair labor practice complaint did Home deny joint employer status with Cycle and insist, as an affirmative defense, that Cycle is an independent contractor (A. 14).[7]

The Home also argues (Br. 22-30) that it should not be held liable for the unfair labor practices committed herein since it had not participated in the commission of these violations. The facts, however, show that the Home was substantially involved in their commission. It was Home's management which permitted Local 144's agents almost unlimited access to the unit employees during their organizing campaign while disallowing other union agents the same free access. In addition, various

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[7] The Home's reliance upon *N.L.R.B. v. Mayer,* 196 F.2d 286 (C.A. 5, 1952) is wholly misplaced. In *Mayer* the court was not even considering a joint employer question. The court dismissed a claim of vicarious liability on the employer's part for certain §8(a)(1) charges since the person who had committed them was merely a friend of the employer's – a businessman from the same town – who had *no connection whatsoever with the employer's business.* (emphasis added). *N.L R.B. v. Mayer, supra,* 196 F.2d at 288.

Home staff supervisors were repeatedly seen by the employees fraternizing with Local 144 organizers. On various occasions when Home supervisors were told of the presence of Local 144's representatives soliciting support or were themselves actually present during the solicitations, they voiced no objections. As to the discriminatory discharge of Ortiz, although it was Cycle's supervisor Watkins who actually fired him, Nursing Home Administrator Lebowitz was fully aware of Ortiz's union sympathies as well as of Cycle's alleged dissatisfaction with Ortiz's work performance. In fact at Lebowitz's suggestion, both he and Watkins spoke with Ortiz about the necessity for improvement in Ortiz's attendance record. Thus, the Home's citation of *Lummus Co. v. N.L.R.B.*, 339 F.2d 728 (C.A.D.C., 1964) is entirely inapposite, since there the employer literally did not participate in the unfair labor practices nor did he have any actual knowledge of them.

The Home's further argument, that in determining liability under the Board's joint employer doctrine, a different standard should be applied for violations of Sections 8(a)(2) and (3) of the Act versus violations of Section 8(a)(5), is wholly without foundation in law. The determination of joint employer status is unrelated to the type of unfair labor practice violation alleged.[8] Although joint employer cases often arise in the posture of a violation of Section 8(a)(5), (see: *N.L.R.B. v. Greyhound Corp., supra; N.L.R.B. v. Dayton Coal and Iron Corp, supra; Ace-Alkire Freight Lines, Inc. v. N.L.R.B., supra*) many such cases involve other types of

[8] *N.L.R.B. v. Deaton, Inc.*, 502 F.2d 1221 (C.A. 5, 1974) and *N.L.R.B. v. Sachs*, 503 F.2d 1229 (C.A. 7, 1974) are not to the contrary. In both cases the Courts affirmed the Board's finding of joint employer status. However, in *Deaton* the employers were found to have violated Section 8(a)(5), while in *Sachs* the employers were guilty of violating Section 8(a)(3).

unfair labor practice violations — often discriminatory discharges in violation of Section 8(a)(3) and (1), as in the instant case. See, for example, *N.L.R.B. v. Jewell Smokeless Coal Corp., supra; Majestic Molded Products, Inc. v. N.L.R.B.*, 330 F.2d 603 (C.A. 2, 1964); *N.L.R.B. v. Gibralter Industries, Inc., supra.*[9]

Equally without merit is the contention that joint employer status should not be imposed on an employer in the health care field, because the safety and welfare of the patients requires a high degree of supervision over a maintenance contractor's employees. Cycle's employees, however, merely provided the Home with janitorial services — essentially the same service provided to the Greyhound Corporation in *N.L.R.B. v. Greyhound Corp., supra* — and the kind of supervision and control exercised by the Home over Cycle's employees was not required by the circumstances of the Home's being a health care facility, but rather was almost identical to the control exercised by Greyhound Corporation over the porters, maids and janitors who serviced its bus station. In any event, assuming that extraordinary control was necessary to protect the health interests of Home's patients, the record clearly shows that the employees of Cycle, from the housekeeper down were *de facto* employees of Home at the time the unfair labor practices were committed (*N.L.R.B. v.*

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[9] The Home misconstrues the "purpose of the statute" test as enunicated in *Carnation Co. v. N.L.R.B.*, 429 F.2d 1130 (C.A. 9, 1970). In that case when the Ninth Circuit stated that an individual may be an employee for some purposes and not for others, it was referring to employee status for purposes of a federal statute, such as the Federal Tort Claims Act, versus employee status under state law; the court did not suggest that an individual may be considered an employee for some portions of a single statute and not for others.

Gilbralter Industries, Inc., supra, 307 F.2d at 431[10]) and it is the existence of this control, and not the particular business considerations which prompted it, which is legally significant.

Finally, the Home urges that the Board's reinstatement and backpay order exceeds the Board's authority since Ortiz was never on Home's payroll. This argument misses the mark. It is settled doctrine that in the words of one court, "an employee who has been discharged in violation of the Act assumes a peculiar status. The Board has very broad discretion in vindicating the Act through him." *Southern Tours, Inc. v. N.L.R.B.,* 401 F.2d 629, 634 n. 1 (C.A. 5, 1968). Moreover, since the Board's order runs against both Home and Cycle as joint employers, to the extent the Home might have difficulty in effectuating this particular portion of the Board's order, it is certainly within the power of Cycle to do so, and as noted, *supra,* p. 10, Cycle is subject to this Court's judgment to provide reinstatement. If some extraordinary circumstance arises so that Cycle cannot offer reinstatement, the matter will be fully explored in further proceedings before the Home's precise obligation is fixed. Cf. *N.L.R.B. v. CCC Association, Inc.,* 306 F.2d 534 (C.A. 2, 1962).

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[10] The Home mistakenly relies on *Local 825, Int'l Union of Operating Engineers,* (Morin Elec. Co. Inc.) 168 NLRB 1 (1967), to support its contention that whenever safety is a factor on a job site, a prime contractor's exercising supervision and control over employees does not create joint employer status. In *Local 825* the Board merely found that the routine instructions and safety requirements exercised by Morin's foremen were not the type of control contemplated by the joint employer doctrine.

CONCLUSION

For the foregoing reasons, the petition for review should be denied, and the Board's order should be enforced in full.

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December 1975

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

MAURICE GERSHMAN d/b/a QUEENS-NASSAU NURSING HOME, Petitioner,	)	
v.	)	No. 75-4165
NATIONAL LABOR RELATIONS BOARD, Respondent.	)	
* * * * * * * * * * * *	)	
NATIONAL LABOR RELATIONS BOARD, Petitioner,	)	
v.	)	Nos. 75-4187, 75-4188
CYCLE CLEANING CORPORATION, Respondent.	)	

CERTIFICATE OF SERVICE

The undersigned certifies that three (3) copies of the Board's offset printed brief in the above-captioned case have this day been served by first class mail upon the following counsel at the addresses listed below:

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Deputy Associate General Counsel
NATIONAL LABOR RELATIONS BOARD

Dated at Washington, D. C.

this 17th day of December, 1975.